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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ALBERT RIVERA, JR.,

Defendant and Appellant.

D073929

(Super. Ct. No. SCD273709)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed in part and reversed and remanded with directions.

Jorge Albert Rivera, Jr., in pro. per.; and David Dworakowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, and Andrew Mestman, Deputy Attorney General, for Plaintiff and Respondent.

Jorge Albert Rivera, Jr.,¹ was charged with felony assault by means of force likely to produce great bodily injury (Pen. Code, § 245, sub. (a)(4);² count 1) and battery with serious bodily injury (§ 243, subd. (d); count 2). The charging information also alleged (1) Rivera personally inflicted great bodily injury upon the victim in the commission of count 1 (§ 12022.7, sub. (a)); (2) two prior strike convictions (§ 667, subds. (b)-(i)); (3) two prior serious felony conviction sentence enhancements (§ 667, subd. (a)); and (4) three prior prison terms (§ 667.5, subd. (b)). In accordance with a plea agreement, Rivera pled guilty to count 1 and admitted the great bodily injury enhancement to count 1, one prior strike conviction and two serious felony prior convictions. Rivera was sentenced to a total of 14 years in prison in accordance with the plea agreement, which included consecutive five-year terms for each of his serious felony prior convictions under section 677, subdivision (a).

Rivera filed a notice of appeal and requested a certificate of probable cause, which the trial court denied. Appointed appellate counsel filed a brief presenting no argument for reversal but requesting that this court review the record for error in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We offered Rivera the opportunity to file his own brief on appeal, and he has filed a form petition for writ of habeas corpus, which we have accepted as his brief. We also requested supplemental briefing on the

¹ There are inconsistencies in the record as to defendant's true name. The abstract of judgment identifies him as "Jorge Albert *Ruivera*." The record identifies the defendant as "Jorge Albert *Rivera, Jr.*" In light of these inconsistencies, we will remand the matter to the trial court for a determination of defendant's true name and, if necessary, correction of the abstract of judgment in that regard.

² All subsequent statutory references are to the Penal Code.

impact of Senate Bill No. 1393. After consideration of the supplemental briefs and independently reviewing the record for error, as required by *Anders v. California* (1967) 386 U.S. 738 (*Anders*) and *Wende*, we remand for the limited purpose of allowing the trial court to consider the impact of newly amended section 667, subdivision (a)(1) on Rivera's sentence.

PROCEDURAL AND FACTUAL BACKGROUND

The circumstances surrounding the charges against Rivera were described by Rivera's victim and several witnesses during a preliminary hearing. The victim testified he was playing frisbee golf with several friends when he heard tree branches breaking nearby. The victim yelled "leave the trees alone" and then immediately saw Rivera standing nearby. The victim heard Rivera say the word "respect" and then said to Rivera "you didn't give that tree much respect."

After some additional back and forth, the victim saw Rivera put on a device that covered his knuckles and then Rivera punched the man in the face, knocking him unconscious. The punch split the man's cheek open and caused his nose to bleed. He was taken to the hospital by ambulance. The victim suffered broken facial bones requiring surgery and ongoing follow-up with specialists. Two witnesses who saw the altercation provided testimony that aligned with the victim's, except neither recalled seeing Rivera put anything on his hand. One witness testified that she believed Rivera was intoxicated.

After the preliminary hearing, Rivera agreed to a guilty plea for felony assault. He also agreed to admit the great bodily injury enhancement to that charge, one prior strike

conviction and two serious felony prior convictions. At the plea hearing, pursuant to the plea agreement, the court struck the great bodily injury enhancement under section 1385 and dismissed count 2 and the additional sentencing enhancements not admitted by Rivera. Rivera agreed to a sentence of 14 years, and the trial court ordered a sentencing report prepared by the probation department.

At the outset of his sentencing hearing, Rivera requested to replace his public defender under *People v. Marsden* (1970) 2 Cal.3d 118. The trial court denied the request and proceeded to sentencing. The court denied probation and sentenced Rivera to an aggregate term of 14 years, consisting of the low term of two years for the felony assault charge, doubled to four years under section 667, subdivisions (b)-(i) for the strike prior, and two consecutive five-year terms for each serious felony prior conviction under section 677, subdivision (a). The court also awarded 92 actual credits and 13 conduct credits.

DISCUSSION

In his filing, Rivera asserts that he received ineffective assistance of counsel at the preliminary hearing because his defense counsel failed to present his defenses that (1) Rivera acted in self-defense because the victim was intoxicated and had antagonized him; and (2) he suffers from a substance abuse issue, which should have mitigated his sentence. Appellate counsel has also identified as an issue that "might arguably support the appeal" (*Anders, supra*, 386 U.S. at p. 744) that "the trial court erred in denying appellant's request to replace his appointed counsel pursuant to *People v. Marsden, supra*, 2 Cal.3d 118." Competent counsel has represented Rivera on this appeal, and we have

considered these issues and conclude they do not raise any reasonably arguable issue for reversal on appeal.

However, after consideration of the supplemental briefs filed at our request, we conclude that Rivera is eligible for relief under the recently enacted amendments to sections 667, subdivision (a) and 1385. Rivera's supplemental brief asserts that Senate Bill No. 1393, which became effective on January 1, 2019, and grants discretion to trial courts to strike prior serious felony enhancements imposed under section 667, subdivision (a), applies retroactively to his case. The Attorney General's supplemental brief objects to the application of the law in this case, asserting that it would deprive the People of the benefit of their plea bargain. Further, the Attorney General contends that even if Rivera is entitled to the benefit of the new law, remand for resentencing would be futile.

As an initial matter, we agree with the reasoning of *People v. Garcia* (2018) 28 Cal.App.5th 961 that "Senate Bill [No.] 1393 is ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes." (*Id.* at p. 972.) Further, "under the *Estrada*³ rule . . . it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final" when the legislation took

³ *In re Estrada* (1965) 63 Cal.2d 740.

effect. (*Id.* at p. 973.) Rivera's case was not yet final when the law took effect on January 1, 2019.

Although the Attorney General recognizes in his brief both that, "parties to a plea bargain are subject to future changes in the law" and that "a plea agreement does not divest the court of its inherent sentencing discretion," he argues, quoting *People v. Segura* (2008) 44 Cal.4th 921 (*Segura*), that " '[o]nce the court has accepted the terms of the negotiated plea, '[it] lacks jurisdiction to alter the terms of the plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree.' " (*Id.* at p. 931.) We disagree with the Attorney General's argument that remand is precluded here.

As the Attorney General points out, a " 'negotiated plea agreement is a form of contract' " that is interpreted according to general contract principles. (*Segura, supra*, 44 Cal.4th at p. 930.) "Unless a plea agreement contains a term requiring the parties to apply only the law in existence at the time the agreement is made, . . . 'the general rule in California is that the plea agreement will be "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." ' " (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 57 (*Hurlic*), citing *Doe v. Harris* (2013) 57 Cal.4th 64, 66.)

Because Rivera's plea bargain does not contain a term limiting the agreement only to the law in existence at the time it was entered, it incorporates the subsequent enactment of Senate Bill No. 1393 and gives Rivera "the benefit of its provisions without calling

into question the validity of the plea" (which would have required Rivera to obtain a certificate of probable cause). (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57.) We note that as in *Hurlic*, which considered the impact of recent legislation giving courts discretion under section 1385 to strike firearm enhancements on a defendant similarly situated to Rivera, because the new law grants the trial court at most discretion to strike the prior serious felony conviction enhancements, on remand the court may end up imposing the same 14-year prison sentence.⁴ (*Hurlic*, at p. 57.) We express no opinion on how the trial court should exercise its discretion.

We also reject the Attorney General's argument that remand is not warranted in this case "because the trial court's statements at sentencing suggested that it would not have stricken the . . . prior serious felony convictions." Specifically, the Attorney General points to the court's statements that "You made a deal for 14. So legally, I can't give you anything less than 14 years state prison and even if I could, I would not. You deserve, sir, every year of those 14 years that you are getting. . . . You are not, sir, going

⁴ The Attorney General relies on *People v. Enlow* (1998) 64 Cal.App.4th 850 (*Enlow*) to support his argument that allowing the court to exercise its discretion under Senate Bill No. 1393 would deprive the parties of the benefit of their bargain. *Enlow*, however, involved a sentence issued under a statute that contained a sunseting elevated sentencing provision. (*Enlow*, at p. 855.) On appeal, the defendant argued that he was entitled to be resentenced according to the lesser punishment that automatically went into effect after he was sentenced, but before the sentence was final. (*Ibid.*) This court rejected the defendant's argument, holding his failure to obtain a certificate of probable cause barred his challenge to the sentence based on the sunset provision since the sunseting of the higher punishment was known to the parties at the time the plea agreement was made. (*Id.* at pp. 857-859.) Unlike the statute at issue in *Enlow*, the changes to the law at issue here did not occur until after Rivera's plea agreement was entered.

to get less than 14 years. You are going to get exactly what you bargained for, which is 14 years state prison."

Several appellate courts, including this one, have held that resentencing under recent legislative amendments giving trial courts discretion to strike firearm enhancements is not required when "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) However, defendants " ' ' "are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." ' ' " (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, quoting *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Although the trial court commented that the 14-year sentence agreed to by the parties was appropriate, it did not give a clear indication that it would not have exercised discretion to strike the prior serious felony enhancements if it had such discretion. Accordingly, Rivera is entitled to remand.

DISPOSITION

The cause is remanded to allow the superior court to consider the impact of its new sentencing authority under sections 667, subdivision (a) and 1385 on Rivera's sentence. In addition, due to the inconsistencies of the defendant's name, the trial court is

directed to determine his true name and, if necessary, correct the abstract of judgment in that regard. In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.